

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

O.S.)	
)	
)	Plaintiff,
)	
v.)	CIVIL ACTION
)	
FAIRFAX COUNTY SCHOOL BOARD,)	1:13-cv-1580
)	
)	
)	Defendant.
)	

REPORTER'S TRANSCRIPT

MOTIONS HEARING

Friday, August 22, 2014

BEFORE: THE HONORABLE T.S. ELLIS, III
Presiding

APPEARANCES: CAITLIN E. McANDREWS, ESQ.
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Alexandria Division

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1 (Court called to order at 11:25 a.m.)

2 THE CLERK: O.S.. vs. Fairfax County Public
3 Schools, Civil Action No. 1:13-cv-1580.

4 Counsel, please not your appearance for the
5 record.

6 THE COURT: All right. Who's here for the
7 plaintiff?

8 ATTORNEY McANDREWS: Caitlin McAndrews on
9 behalf of the plaintiff.

10 ATTORNEY GEHRING: And Michael Gehring on
11 behalf of the plaintiff as well.

12 THE COURT: All right. Who will argue
13 today?

14 ATTORNEY GEHRING: I will argue, your Honor.

15 THE COURT: All right. Mr. McAndrews?

16 ATTORNEY GEHRING: Mr. Gehring.

17 THE COURT: Gehring. I'm sorry. It's
18 Ms. McAndrews.

19 ATTORNEY McANDREWS: Correct.

20 THE COURT: Thank you.

21 All right. Who's here for the defendant?

22 ATTORNEY CAFFERKY: John Cafferky, your
23 Honor, for the defendant.

24 ATTORNEY MINSON: And Patricia Minson, your
25 Honor.

1 THE COURT: All right. Who will argue for
2 the defendant?

3 ATTORNEY CAFFERKY: I'll be arguing.

4 THE COURT: All right. Thank you.

5 I think the best way to proceed this
6 morning, you all have filed very extensive briefs. And,
7 in fact, I think it's fair to say that a small forest
8 has been sacrificed. So I think I'm reasonably
9 informed. It's a significant administrative record that
10 I've had to review, including two days of testimony. I
11 think it was two days.

12 ATTORNEY McANDREWS: Three, Your Honor.

13 THE COURT: Three days. It was over a
14 thousand pages, as I recall.

15 All right. I think the best way, then, to
16 proceed is just to have you go as you did there. Let's
17 begin with the plaintiff, because you're both seeking --
18 well, the plaintiff is seeking -- defendant is seeking a
19 judgment on the administrative record, and the plaintiff
20 is seeking a reversal or -- of the administrative
21 conclusion by the independent hearing officer.

22 So let's begin -- let's begin, then, with
23 you, yes, Mr. Gehring.

24 ATTORNEY GEHRING: Thank you, your Honor.

25 Your Honor, as you noted, this is -- this

1 case has been extensively briefed. There's a very
2 extensive administrative record. And as the Court
3 noted, the Court has extensively reviewed the record.
4 So I'm not going to burden the Court with lot of
5 additional points. If your Honor has any questions,
6 I'll be certainly glad to answer them.

7 Just a few main points I'd like to make.
8 The decision in this case by the hearing officer is just
9 remarkable. I've never seen one like it that is so
10 one-sided in its presentation of the evidence in the
11 case.

12 The hearing officer cites to a few
13 documents, but largely this decision consists of
14 block-quoting conclusory testimony by school district
15 witnesses and giving it complete deference. And when I
16 say "conclusory," things like, "Oh, O.S. made progress.
17 He did real well," completely ignoring contradictory
18 testimony that was brought out on cross-examination and
19 objective clear evidence that O.S. was not making
20 satisfactory educational progress in his program.

21 There is objective evidence in the record
22 that the hearing officer doesn't mention in his opinion,
23 not once. Included in that objective evidence is
24 testing -- academic achievement testing conducted by the
25 Kennedy Krieger Institute during O.S.'s kindergarten

1 year in February and his 1st grade year I believe in
2 May. And this is the exact period of time at issue in
3 this case.

4 That objective testing by Kennedy Krieger
5 Institute, a very well-respected organization that knows
6 what it's doing, found that O.S. had regressed in
7 academic areas and many behavioral areas as well between
8 February of his kindergarten year and May of his 1st
9 grade year, objective testing showing that his scores
10 went down.

11 And at the same time, the Court -- the
12 Kennedy Krieger found that his cognitive scores had gone
13 up quite a bit. O.S.'s cognitive scores -- what his
14 potential was intellectually, those scores rose. But at
15 the same time that those scores rose, his academic
16 achievement scores went backwards.

17 So the testimony -- the conclusory testimony
18 by Fairfax County Public School employees that O.S. was
19 making progress is entirely contradicted by this
20 objective testing as well as by their own testimony on
21 cross-examination where they were forced to concede that
22 O.S. was not making expected progress and that they were
23 also forced to concede that in certain areas his
24 progress was -- his academic achievement level was still
25 back in kindergarten.

1 At the end of 1st grade, O.S. was still
2 reading only 23 out of 40 kindergarten sight words. So
3 after having been in the school district for all of
4 kindergarten and all of 1st grade, he was still only
5 reading about half of words that he should have been
6 able to read in kindergarten.

7 His -- he was receiving reading instruction,
8 pursuant to which his teacher testified that he had
9 essentially made two and a half months' progress in the
10 entire school year in 1st grade. At that rate, he would
11 be far, far behind a few years from now.

12 The hearing officer in his opinion never
13 mentioned this testimony. So it's our contention that
14 this -- the factual findings of the hearing officer
15 should not be given the deference that is ordinarily
16 given in this circuit to opinions of hearing officers.
17 This is not simply a case where he didn't -- wasn't
18 detailed enough in his explanation of the evidence or
19 talked about the evidence of one side more than the
20 other or the evidence favoring one side more than the
21 other. As to certain key areas of evidence, he doesn't
22 mention it once.

23 And you'll see that pattern repeated in
24 Fairfax County Public Schools' briefs, not once in the
25 first four -- first two rounds of briefing. We both

1 submitted motions for judgment on administrative record
2 supporting memorandum. We were both submitting
3 responses. You're not going to find word one about the
4 Woodcock-Johnson testing done by Kennedy Krieger
5 Institute that clearly shows that O.S. regressed
6 academically in his kindergarten and 1st grade years,
7 the exact years at issue here.

8 It's inconvenient for them, and it also --
9 by discussing it, it points out the fact that the
10 hearing officer doesn't mention it. It's as if it
11 doesn't exist. Objective achievement testing is used
12 widely in school districts as a way of measuring
13 academic progress. Fairfax County Public Schools used
14 it themselves to measure O.S.'s academic progress.

15 Jessica Mendez, one of O.S.'s teachers in
16 1st grade, conducted objective achievement testing on
17 behalf of the school district in order to determine
18 O.S.'s eligibility under -- continued eligibility under
19 IDA and specifically testified on cross-examination that
20 she did so. She relied on that rather than on progress
21 reports because the achievement testing is objective,
22 and the progress reports are less than objective.

23 So we have teacher after teacher saying he
24 made good progress and showing their progress reports,
25 which consist mainly of putting a 3 or a 4 in a box.

1 The data behind those progress reports has disappeared.
2 They destroyed it per policy of the school district.

3 In the areas where -- and many of those
4 progress reports did not measure progress objectively.
5 It was more of a subjective field test, essentially, by
6 the teacher. In the areas where there was objective
7 testing, for the most part the progress reports actually
8 showed that O.S. was not doing well academically.

9 And that evidence is simply not discussed by
10 the hearing officer in his opinion. And having
11 completely ignored this very compelling evidence of
12 O.S.'s lack of achievement and lack of educational
13 progress, this Court, I would submit, should not give
14 the hearing officer's finding of facts any deference at
15 all.

16 Instead, the Court should respectfully look
17 at the objective evidence of O.S.'s lack of achievement
18 and use that to measure whether O.S. made academic
19 progress or educational progress under his IEPs.

20 The *S.H.* court decision in this circuit,
21 *S.H. vs. Fairfax County*, makes it very clear that
22 progress or lack thereof is probably the best indicator
23 of whether a student's IEP's are appropriate or not. In
24 this case, there was a clear lack of educational
25 progress, which demonstrates pretty clearly that the

1 IEPs were inappropriate either as written or as
2 implemented.

3 We have testimony in the record that the --
4 O.S. was not given his specially designed instruction in
5 reading and math according to the protocols of the
6 programs that were used by his teachers. Research-based
7 instruction only works if you do it according to
8 protocols, and his teachers admitted they did not. They
9 either didn't use a -- put O.S. in a homogenous grouping
10 with students of similar abilities and/or they gave it
11 20 or 30 minutes a day rather than 45 minutes per day
12 that is recommended and has been proven to work.

13 In this case, they did not follow those
14 protocols and, to a great degree, it did not work
15 because O.S. regressed in math and reading.

16 The district also failed him in terms of
17 behaviors. In Exhibit 92 and elsewhere in the exhibits
18 that we've cited, there's clear objective evidence by
19 O.S.'s teachers that -- and this is from March of 2013,
20 so near the end of his 1st grade year -- that O.S. was
21 experiencing significant behavioral problems that were
22 never addressed by Fairfax County Public Schools.

23 He needs repeti- -- and this is, 5, "Most of
24 the time, needs repetition of instructions. Appears to
25 have problems with short-term memory" -- I'm sorry. I

1 read that one incorrectly. "Loses track of what he is
2 doing. Shows highly inconsistent or erratic patterns of
3 attention. (Inaudible) inconsistently during the day.
4 Evidence of extreme performance inconsistency. Shows
5 deterioration over time when he or she undertakes the
6 completed assignment." This is by his teacher -- two of
7 his teachers: Ms. Whiteman and Ms. Mendez.

8 And did the Fairfax County Public Schools
9 have a behavioral plan in place for O.S.? No, they
10 didn't. Did they ever do a functional behavioral
11 assessment to assess why O.S.'s behaviors were like this
12 and discover the best way to remediate them through a
13 behavioral intervention plan? No, they didn't.

14 So O.S. had behavioral issues throughout
15 kindergarten and 1st grade that were completely
16 unremediated by the school district. And at the same
17 time, we have the teachers coming in saying, "Oh, he did
18 great. He's a great kid. Loved having him."

19 But the objective questionnaire that was
20 filled out by Ms. Whiteman and Ms. Mendez shows very
21 clearly he had significant behavioral issues that were
22 interfering with his learning that were unaddressed by
23 the school district. Again, this is not mentioned by
24 the hearing officer in his opinion.

25 THE COURT: Anything further?

1 ATTORNEY GEHRING: Not at the moment, your
2 Honor. Thank you.

3 THE COURT: Mr. Cafferky?

4 ATTORNEY CAFFERKY: Thank you, your Honor.

5 Let me start with the hearing officer's
6 decision since that is where the Court starts. I would
7 submit to your Honor that it is abundantly clear from --

8 THE COURT: I didn't start with it. He did.

9 ATTORNEY CAFFERKY: Very good, your Honor.
10 I would say in the Court's review, that would certainly
11 be something that --

12 THE COURT: It's an appropriate place.

13 ATTORNEY CAFFERKY: A potential starting
14 point. And I would submit to you, your Honor, that the
15 guidance from the -- our Court of Appeals in this
16 circuit is very clear that the level of, you know,
17 findings have to be regularly made. And "regularly
18 made" really means two things: One, it can't be an
19 arbitrary process and it has to be a -- you have to give
20 the sides an opportunity to present their case and not
21 decide it in an arbitrary way. And secondly, there's
22 got to be some articulation of the essential findings
23 and rationale of the -- by the hearing officer of his
24 decision.

25 But if you look at what the Court of Appeals

1 has said, it's very clear. Our case law suggests that
2 the level of detail required of a hearing officer is
3 very low. The Court said that in the *J.P.* case. And
4 this decision here for Mr. Dangoya I would submit to you
5 goes far beyond the really very modest requirements of
6 articulation that the Court of Appeals has set forth.

7 He makes the essential findings. He -- and
8 there's nothing -- and, in fact, the Court of Appeals
9 has been equally clear that there's nothing wrong with
10 the hearing officer citing to or quoting from the
11 testimony of some witnesses rather than others.

12 *Z.P.*, the Court says *Doyle* does not require
13 the fact -- the hearing officer to explain in detail its
14 reasons for accepting the testimony of one witness
15 over that of another. And if you read through the
16 decision -- and I know you have -- I think you'll see --
17 we would certainly submit to you that Mr. Dangoya is
18 really very much going through a thought process when he
19 articulates and recapitulates and ultimately talks about
20 which witnesses he agrees with.

21 He doesn't have to parse every exhibit. He
22 doesn't have to parse any exhibit, frankly, or the
23 testimony of all the witnesses. And his decision is
24 actually quite extensive in terms of both the discussion
25 of the witness testimony and the reference to specific

1 exhibits and, in particular, two.

2 One is the IEPs because, of course, the
3 question is -- ultimately the question under *Rowley* and
4 the Fourth Circuit's decision in *A.B. vs. Lawson* is
5 whether the school division has offered and provided an
6 educational program that has a reasonable -- that's
7 reasonably calculated or calculated to provide some
8 educational benefit. Some. And, in fact, the "some" is
9 emphasized in the original. It's a fairly modest
10 substantive standard, honestly.

11 And you can see from Mr. Dangoya's decision,
12 I would submit to you, that he relies on the IEPs, and
13 he also relies on the IEP progress reports. I'm going
14 to talk more about those in a moment.

15 But in terms of meeting the standards for a
16 regularly -- excuse me -- findings being regularly made,
17 I think it's clear that he did that both in terms of the
18 detail of the decision and, from looking at the
19 transcript, you can see that this was a hearing
20 officer -- you know, sometimes they just sit there and
21 don't say a word. Mr. Dangoya was very actively
22 involved in the questioning. He --

23 THE COURT: Like I'm doing right now,
24 sitting here just listening.

25 ATTORNEY CAFFERKY: That's completely

1 appropriate, your Honor. But he was certainly involved
2 in the proceedings, and I think the transcript does bear
3 that out.

4 In terms of the -- because I think this
5 issue gets to the issue of reviewing the hearing
6 officer's decision as well. There has been a lot of
7 discussion about the use of -- one thing that's
8 extraordinary about this case -- and counsel obviously
9 talks about their experience of litigating these cases,
10 and I don't know that my personal experience is
11 certainly dispositive of that. But all the decisions of
12 this Court that we cited to your Honor, ones that we've
13 been involved in, the *C.C.* case, the *S.H.* case, the
14 *Knight* case, the *Symtore* (phonetics) case and on and on
15 and on, they routinely involve expert witnesses.

16 Here what you have, the witness set were the
17 school officials and then the parent. So you didn't
18 have any expert witness at all. And whether -- so
19 it's -- in my mind, it's sort of -- given that we know
20 parents have the burden of proof in this proceeding,
21 it's certainly theoretically possible to prove your case
22 through the other side's witnesses or the other side's
23 employees.

24 But I think it's very difficult and
25 challenging to do that because here you have the school

1 employees saying -- testifying that the IEPs were
2 appropriate and the student made at least some progress.
3 Maybe not all the progress that a regular non-disabled
4 student would make. Not even necessarily all the
5 progress that they would like to have seen from this
6 student. But the question is ultimately is this a
7 reasonable plan that's design to allow the student to
8 receive some educational benefit? I think on the
9 evidence, the answer to that is clearly yes.

10 Now, with respect to -- counsel is certainly
11 right. One measure -- not the only measure, but one
12 measure of whether a program is appropriate is whether a
13 student has made progress in it. And so there's a lot
14 of -- there's a lot of discussion in the papers, as your
15 Honor knows, about the progress and the standards of
16 progress and so forth and so on. A couple things I just
17 want to point out.

18 This is a student that during the times at
19 issue was five and six years old. So we're not talking
20 about a junior high school or high school student or
21 even a later elementary school student. There are many
22 ways to measure academic progress, particularly for such
23 a young student. And counsel refers to the *S.H.* case
24 that was decided by Judge O'Grady. I would commend that
25 to your Honor as well because that's the case where you

1 had some standardized testing. And, of course, this
2 standardized testing can only really be given once a
3 year. It's in an individual sort of artificial
4 environment.

5 What Judge O'Grady said there was -- and
6 Judge Brinkema likewise in the *Knight* case, you have to
7 look at a variety of different kinds of measures. And,
8 in fact, a lot of times standardized testing -- this is
9 true as a general proposition, and I want to talk about
10 the evidence here in a minute. You've got to look at
11 other measures. The information that you get from
12 teachers, what are called criterion reference measures.

13 As your Honor knows, a standardized test is
14 something that's done with a norming sample and it's
15 administered to a -- you know, thousands of people to
16 come up with standardization norms and so forth.

17 You have something called criterion
18 reference tests which are how do you measure up
19 according to a certain criterion. The DRA -- there's
20 reference to that -- the Developmental Reading
21 Assessment, I think it's called, Dolch words, which are
22 a list of the 200 most commonly used words, is another
23 measure. They talk about that.

24 But IDEA itself recognizes that you can't
25 give a special education student a standardized test,

1 whether it's a Woodcock-Johnson, you know, that's
2 something that takes hours on a regular basis.

3 And if you look at what IDEA itself says you
4 should look at, one of the things that they specifically
5 mention are these IEP progress reports. It's there in
6 34CFR300.320A3ii, which requires periodic reports on
7 whether the child's making progress vis-à-vis the IEP
8 goals.

9 So when counsel says -- and particularly in
10 our brief in opposition at Pages, I think, 9 through 17
11 or something like that, you'll recall that we set out
12 large chunks of those. Those are not just -- those IEP
13 progress reports are serious things. They are based
14 upon -- they are reporting in the categories of the
15 student's IEP and the student's educational plan. So
16 they're particularly relevant.

17 And I think if you look at the testimony
18 from the teachers, Ms. Mendez, Mr. Rubenstein,
19 Ms. Green, Ms. Wallow, who prepared that, they don't
20 just -- I mean, I think it's a little insulting to the
21 teachers to think they just dream up a number and put it
22 on there.

23 Honestly, if you look at the narrative
24 comments that go along with it, you'll see there are
25 many -- when you look at IEP goals, things like can the

1 student formulate a couple sentences, can they do it on
2 their own or with one or two prompts, can they -- do
3 they have their math facts correct and many of the other
4 things that are referenced in our briefing, you can see
5 not just from the numbers, but from the narrative
6 comments that -- that -- just looking on Page 12 or Page
7 13, O.S. related an experience from his past by
8 spontaneously giving at least three details.

9 When you start out in June of 2011, he's
10 spontaneously able to relate some instances, but not
11 give the details. And then by the following March, he's
12 mastered the goal. He's able to share many personal
13 experiences using many details.

14 There are -- I'm not going to belabor it.
15 You can -- it's already in the administrative record, 55
16 and 61. But there are many, many, many -- maybe we went
17 overboard, but we wanted to make the point these IEP
18 progress reports are important, they take them
19 seriously -- and by the way, with respect to the issue
20 of -- you know, if you look at the testimony at 724 to
21 725 and 773 to -74, what you'll see is that the notes or
22 scraps of paper or the underlying raw source material
23 that they use to keep track of this stuff they hold
24 to -- for reporting purposes. They hold on to that at
25 the end of the -- till the end of the year.

1 And if the parent wants to look at them, all
2 they have to do is ask. After that, they don't keep
3 them forever. They're not required to. They don't have
4 the space to do that. The record of what took place
5 becomes the actual report itself. So there's nothing --
6 we would submit, anything wrong with that.

7 The other thing I should -- the other couple
8 things I want to say about progress is -- generally want
9 to say about progress is O.S. is a student who's
10 eligible for special education. And so -- and he's
11 very -- your Honor asked the question when we were here
12 for the -- here on one of the hearings on the motion to
13 dismiss about O.S.'s disabilities.

14 He's a very interesting youngster in the
15 sense of his disability classification is other health
16 impaired on the basis of this Doose Syndrome, which is a
17 seizure disorder, even though really in school he hasn't
18 had seizures, at least for a number of years.

19 But if you look at the report and the
20 testimony of the psychologist, Dr. Powell, and the
21 eligibility report, Administrative Record 7, it's clear
22 he's got a number of things going on. He's got some
23 cognitive rigidity. He's got visual and auditory
24 processing problems. He's got pretty significant
25 attentional disorders or attentional issues working

1 memory problems, and stamina issues. You've got a lot
2 going on for a five-, six-, seven-year-old.

3 It's not surprising -- and Judge Brinkema
4 says this in the *Knight* case. It's not surprising that
5 a student with these kinds of disabilities isn't going
6 to progress at the same rate as some other students may.

7 And in O.S.'s case -- in O.S.'s case -- this
8 is something that was touched on in the brief, but maybe
9 not as much as it should be. During 1st grade, which is
10 primarily the time period we're talking about -- there's
11 180 days in the school year -- O.S. missed 32 days, plus
12 parts of 19 other. So he missed all or part of 51 days.
13 That's like missing -- and the principal Mr. Meyer and
14 Ms. Mendez, the teacher, talked about this. That's like
15 missing more than a day a week.

16 So when we -- and they were asked a
17 question, "Does this have an impact on his education?"
18 They said absolutely, it did. So when you look at
19 O.S.'s progress, you've got to keep in mind his
20 disabilities. You've also got to keep in mind his
21 attendance during that year.

22 Now --

23 THE COURT: What does the record show about
24 why he had those missing days?

25 ATTORNEY CAFFERKY: It really -- it really

1 doesn't, your Honor. I mean, I think it was a mixture
2 of medical appointments and tardies as a result of that
3 and are other absences. I honestly couldn't say what
4 the specific -- but here again, he does have medical
5 issues.

6 And the other thing is, though, the time --
7 it isn't as thought the time was taken like a week here,
8 and then two weeks there or whatever. It's, no, a day
9 or a couple of days here, and then, you know, later --
10 that makes it hard -- I think Ms. Mendez talked about
11 this -- to get kind of an instructional rhythm going,
12 particularly for a youngster who, as a 1st-grader, is in
13 his first year really of full-time school.

14 The -- counsel talked a lot about the
15 standardized testing, so I do want to talk about that.
16 A number of things important things to be said there.

17 First of all -- and this gets back to --
18 this gets back to why it's important to have witnesses
19 or expert witnesses if you're going to talk about an
20 esoteric area like educational testing. A couple of
21 important things there. Counsel said that the academic
22 testing done by Kennedy Krieger Institute reflected that
23 O.S. had regressed. In fact, that's not at all what it
24 says. If you look at Administrative Record 46 at Page
25 5, what it says, in comparison with previous

1 evaluations, "While O.S. has made developmental progress
2 in his academic skills, he has progressed at a slower
3 rate than expected."

4 Well, so what we know is he's progressed.
5 Maybe not up to someone's expectations. Of course, the
6 tester didn't testify, and the only person who testified
7 about testing was Dr. Powell. So -- and I want to just
8 say when we talk about people testifying, these
9 administrative hearings, it's not overly -- private
10 people from Kennedy Krieger, they testify all the time.
11 Ordinarily, they testify on the telephone. It's not --
12 so I would very much disagree that the -- that the
13 Woodcock-Johnson testing shows regression.

14 But one thing the record does reflect is the
15 only psychologist who testified was Dr. Powell. And
16 what Dr. Powell said is that the Woodcock-Johnson that
17 counsel's talked so much about in terms of its
18 objective, its this, its that, well, it's a test that's
19 administered -- to be administered to kids from
20 preschool age through adulthood.

21 So what Dr. Powell said is -- at 617 and
22 thereabouts is it's not sufficiently discriminating at
23 these -- you know, to really figure out whether a
24 student is making academic progress between kindergarten
25 and 1st grade. Because the difference between getting

1 one level and another may be only one test item.

2 And that's why -- you know, so in terms of
3 the evidence about the testing, that's it. Nobody else
4 talked about that. And that's precisely why, if you
5 look at decisions from -- both from this Court, you
6 know, in the *Knight* case and the *S.H.* case and the other
7 courts, in the *Viola* case, there are many cases where
8 they say you've got to look at things other than
9 standardized testing.

10 The other thing is -- about the standardized
11 testing is if you look at the standardized testing that
12 counsel's talking about as Administrative Record 46 --
13 well, two things. If you look at that report, you'll
14 see that the Woodcock-Johnson was one of seven -- at
15 least I think seven test batteries that this youngster
16 got on that day.

17 And that happens, because you can't bring
18 someone up to Kennedy Krieger three or four times, so
19 they run through a bunch of them. But some of those
20 other standardized tests show progress.

21 And by the way, the Woodcock-Johnson has
22 actually got 22 subtests. 22. He was given four of
23 them. Now, I'm not necessarily faulting Kennedy
24 Krieger. That have a lot of other tests. But that's a
25 lot of extrapolation in the face of other evidence from

1 testimony from the teachers, their contemporaneous
2 reports.

3 And in terms of progress, one other very
4 important thing, which is the student had a private --
5 parents had a private tutor that worked with the student
6 for an hour a week on some academic things. If you look
7 at Exhibit 87, those are the notes from the tutor.

8 The tutor was actually on their witness list
9 to testify. They chose not to call the tutor to
10 testify. But if you look at those notes, it's really
11 quite extraordinary. The tutor says, "Progress and a
12 consistent gain on language arts. Excellent progress
13 with sounding out words. Continues to improve at a
14 quick pace. Was able to reread a passage after word
15 that didn't make sense to him. Such a big gain in
16 comprehension."

17 Well, you know, the tutor gets a little
18 piece of that, but the tutor works one hour a week. The
19 school staff was working with the student 30 hours a
20 week. So at least a little bit of that credit's got to
21 go to the school system, and that's a good metric from
22 an outside person saying, "Hey, O.S. really is
23 progressing."

24 THE COURT: Anything further?

25 ATTORNEY CAFFERKY: I don't -- I think

1 really everything else, your Honor -- I want to see if
2 I've addressed all of counsel's points.

3 I think -- oh, yes. Yes. The behavior --
4 the behavior plan. There was -- there was some
5 testimony about that, about whether either an aide or a
6 nurse or a behavior plan was necessary. And here again,
7 I would say to you that the evidence on that point is
8 that he didn't. There was -- there was some discussion
9 in the record of another student that was picking on him
10 or he was mixing it up with. There was a tussle about
11 an iPad at one point, and there were some other things.

12 But the principal testified these are --
13 these are six-year old-kids in their first full day of
14 school. What was going on there was really nothing
15 particularly out of the ordinary. And nobody who
16 testified, certainly nobody from an educational
17 discipline, said that that was necessary.

18 And really, for the most part, O.S. was a
19 happy, social, engaged student. A behavior plan, just
20 for -- just so it's clear, what's called a functional
21 behavioral assessment and behavior intervention plan is
22 basically a tool that's used under IDEA where you have
23 students who have serious behavioral or conduct problems
24 and ordinarily discipline problems. That was not O.S..

25 Otherwise, I'll just rely on my papers, your

1 Honor. Thank you.

2 THE COURT: All right. I'm going to take a
3 recess now. I want to consider what you've said, but
4 also to go back and look at some of the materials. And
5 I'd like for you to return at 1:00, and I'll see if I
6 have any further questions or if I'm able to rule on it
7 at that time.

8 All right, I thank counsel. Court stands in
9 recess until 1:00.

10 (Court recessed at 12:06 p.m.)

11 (Court called to order at 1:09 p.m.)

12 THE COURT: All right. Good afternoon.

13 Let me note at the outset every case that I
14 have the privilege of presiding over is important. It's
15 important to the Court. It's very important to the
16 parties. But I think it's no exaggeration to say that
17 no case is more important to the parties than these IDEA
18 cases. It's, after all, parents trying to do the best
19 for their children. I'm a parent. I know about that.

20 I'm actually a family member with three
21 severely afflicted children, cerebral palsy and autism.
22 I mean significant autism, not any functioning either.

23 I'm also the spouse of a school teacher, and
24 I know about school teachers and I know about schools.
25 And I know how important kids are to teachers in

1 general. So -- and I know generally schools and parents
2 have the same goal. It's to help the children, enrich
3 the children's life, prepare the children for life.
4 But, of course, reasonable people can disagree about how
5 to do that, and that's why we have these cases.

6 I will tell you that I'm an old person. I
7 predate all sorts of IDEA and handicapped children and
8 everything else. I grew up in an era where if you were
9 left-handed, as I was, your left arm would be strapped
10 to your chest, and you would be forced to write with
11 your right hand.

12 I also grew up in an era in another country
13 where I was born and raised where you attended school
14 and you sat two to a bench. You wrote on a chalkboard.
15 And if you wrote something down that was wrong, one of
16 the monks or brothers would come by and rap you on the
17 knuckles, which was hard for me to -- I never became
18 accustomed to that. I wasn't even a believer.

19 But, in any event, things have vastly
20 improved since those days. I think that children who
21 have various afflictions from relatively minor ones to
22 relatively severe ones are treated much, much better
23 today than they were then. Back then they were -- they
24 were essentially ignored. You were either one of the
25 kids they educated or you were called something like

1 retarded and ignored, put away somewhere.

2 So things are much better, but I just wanted
3 to point out that I certainly understand how strongly
4 parents and schools feel about their duty toward these
5 children who have to struggle with certain infirmities;
6 sometimes severe, sometimes not so severe. But even the
7 not so severe infirmities create problems in the
8 development of these children and in the education.

9 At issue in this IDEA case is whether
10 Defendant Fairfax County School Board violated the IDEA
11 in failing to provide a free and appropriate public
12 education to Plaintiff O.S., a disabled student, during
13 his kindergarten and 1st grade school years.

14 Now, the hearing officers', independent
15 hearing officers', record -- and the record generally
16 reflects that O.S. is a student who, at all relevant
17 times, was enrolled in the Fairfax County Public
18 Schools. And during the years in issue, which in this
19 case are kindergarten and 1st grade, he attended
20 Waynewood Elementary School. It was the public school
21 immediately adjacent or next door to O.S.'s home.

22 There's, I think, no dispute that O.S.'s a
23 disabled student of average intelligence, but with
24 significant educational needs. He's been diagnosed with
25 a seizure disorder, Doose Syndrome. Whether he still

1 suffers from this syndrome or whether it's something a
2 child outgrows is not in this record. But he did -- he
3 was diagnosed with seizure disorder, Doose Syndrome, a
4 hole in his heart, the atrial septal defect. And I even
5 have some experience in that area as well. One of my
6 sons is a pediatric cardiologist. And -- well, enough.

7 And he's also been diagnosed with
8 ankyloglossia, a medical anomaly referred to as
9 tongue-tied. He has stronger verbal than nonverbal
10 abilities. He scores in the high average range for
11 verbal reasoning and in the low average range for
12 non-verbal reasoning. He has some fine and gross motor
13 deficits that require occupational therapy, and he also
14 has articulation and speech sound errors that require
15 speech language therapy.

16 He was first referred for determination of
17 special education eligibility in October of 2009. He
18 was found ineligible at that time. But in May of 2010,
19 he was again evaluated and this found eligible to
20 receive special ed services under the disability
21 category of other health impairment; OHI, as its known.

22 This eligibility was predicated on O.S.'s
23 Doose Syndrome, also known as Myoclonic-Astatic
24 Epilepsy, and he began receiving special ed services
25 through a preschool program at Stratford Landing

1 Elementary.

2 In the summer of 2011, O.S. was nearing his
3 kindergarten school year at Waynewood. And the Fairfax
4 County's IEP team met in May of that year to prepare an
5 IEP that would carry O.S. into his kindergarten year.

6 The IEP prepared by the team provided that
7 he would receive 15 hours per week, about half the
8 30-hour school week, of special ed services. All of his
9 special ed services were to be provided in a general
10 education kindergarten classroom with a special
11 education teacher or instructional assistant working
12 with O.S. on his IEP goals in that classroom.

13 The IEP further provided that O.S. would
14 receive two hours per month or 30 minutes each week of
15 occupational therapy to be provided in a special
16 education classroom.

17 O.S.'s parents agreed with this IEP. And on
18 December 14th, after O.S. had begun kindergarten,
19 December 14th, 2011, the IEP team again met to revise
20 O.S.'s IEP. And the IEP team added 30 minutes per week
21 of adapted physical education to a corresponding annual
22 goal -- and a corresponding annual goal of physical
23 education.

24 The IEP team also added a speech evaluation.
25 The parents agreed with this IEP and the corresponding

1 speech evaluation. The speech evaluation was conducted
2 on January 5th and January 30th of 2012, and it revealed
3 that O.S. had needs in the areas of articulation,
4 sentence structure, and following directions.

5 And thereafter, on or about February 10th of
6 2012, the IEP team added an articulation goal to O.S.'s
7 IEP as well as four hours per month or one hour per week
8 of speech language therapy to be provided in a special
9 education therapy room.

10 O.S.'s IEP team also increased his speech
11 language therapy to six hours per month or three
12 30-minute sessions per week with a focus on
13 articulation, following two-step directions, relating
14 experiences, and sequencing concepts.

15 In May of 2012, the record reflects the IEP
16 team met again to review O.S.'s annual IEP and to
17 prepare an IEP for his 1st grade year. O.S.'s IEP was
18 revised to provide updated annual and short-term goals
19 in eight areas: Communication, reading readiness,
20 reading comprehension, writing, writing readiness,
21 mathematics readiness, attending skills, and adapted
22 P.E.

23 The IPE [sic] team also implemented certain
24 steps to help O.S. in areas of need such as picture cues
25 to help O.S. follow multi-step directions and define

1 limits and frequent breaks to help O.S. focus in the
2 classroom. And during this year, he received, pursuant
3 to the IEP, four hours per month of adapted P.E. and two
4 hours per month of occupational therapy and six hours
5 per month of speech language therapy, five of which were
6 in a special ed setting.

7 Now, at the beginning of his first year, 1st
8 grade year, 14 1/4 out of 15 hours of his special ed
9 time was in the general education classroom. However,
10 the IEP team increased the amount of his special ed
11 support provided in a separate special ed classroom as
12 the year went on. And in November of 2012, O.S.'s time
13 in the special ed classroom as opposed to the general
14 educational classroom increased to 7.75 hours per week
15 out of 15 hours of special ed. And in January of 2013,
16 the IEP team further increased this to ten hours per
17 week.

18 Now, during his 1st grade year, for various
19 reasons not gone into in detail in the record, O.S. was
20 absent for 32 days, partially absent for an additional
21 19 days. And as the staff testified, O.S.'s number of
22 absences that year was the highest of any student.

23 In May of 2013, Fairfax County conducted
24 psychological, sociocultural, and educational
25 evaluations. The Fairfax County Eligibility Committee

1 reviewed this information, also reviewed private testing
2 of O.S. done by the Kennedy Krieger Institute. And the
3 committee, which included O.S.'s mother and a family
4 friend, confirmed that O.S. continued to be eligible for
5 education on the basis of the OHI, which, as I said
6 earlier was, the "other health impairment" category.

7 Now, the IEP team reconvened on April 30th
8 and again on June 7 of 2013 to prepare O.S.'s 2nd grade
9 IEP. The IEP team proposed new annual and short-term
10 goals in five areas: One, writing and written language;
11 two, reading; three, mathematics; four, communications;
12 five, behavior improvements.

13 The IEP team further proposed that O.S.
14 continue to receive two hours per month of occupational
15 therapy and six hours per month of speech language
16 therapy, but that all of those hours be provided in a
17 special ed classroom or a separate therapy room.

18 The IEP team also recommended -- or
19 continued to recommend 15 hours of special ed services,
20 but recommended decreasing the amount of time in a
21 special ed class setting to five and a half hours a
22 week.

23 During the June IEP meetings, the parents
24 requested that a one-on-one aide be assigned to O.S..
25 The Fairfax County members of the IEP team considered

1 the request, but eventually determined that this wasn't
2 necessary; that a one-on-one aide was not educationally
3 necessary and would be unnecessarily restrictive for
4 O.S..

5 The parents also requested extended school
6 year services for O.S.. the parents claim that their
7 request was denied. One of O.S.'s teachers testified in
8 the course of the hearing that the IEP team offered to
9 have O.S. attend summer school at Waynewood. This
10 testimony was supported by a July 29th letter from the
11 school to the parents which stated that O.S.'s parents
12 chose not to have O.S. attend the offered site-based
13 summer school program.

14 Parents also sought during the IEP meeting
15 to have a full-time nurse assigned to the school. That
16 was also not adopted by the committee or put in the IEP,
17 and the parents did not sign the June 7th IEP compared
18 to the previous ones.

19 Now, on July 16th of 2013, parents, by
20 counsel now, filed a request for administrative due
21 process hearing, which they were entitled to under the
22 IDEA. And they requested changes to O.S.'s program and
23 placement, compensatory education, attorney's fees, and
24 costs. And they specifically asked that the Fairfax
25 County school -- or contended that the Fairfax County

1 school failed to provide O.S. with a free and
2 appropriate public education in six ways:

3 First, they failed to provide appropriate
4 instruction in reading, math, and written languages.

5 They failed to provide occupational therapy
6 and speech language services.

7 Third, they failed to provide extended
8 school year services.

9 Fourth, they failed to provide a one-on-one
10 aide.

11 Fifth, they failed to program appropriately
12 for O.S.'s safety while at school. That's the nurse.

13 And sixth, they failed to develop an
14 appropriate IEP for O.S. going forward.

15 Now, thereafter, the Fairfax County school
16 staff met with O.S.'s parents and counsel, and the IEP
17 team also reconvened three times between August 23rd and
18 29 to consider certain changes. As a result of those
19 meetings, Fairfax County Public Schools offered O.S.'s
20 parents revised IEPs dated August 13th. There was
21 another one on August 20th and another one on
22 August 28th.

23 These IEPs changed some of the goals,
24 accommodations, and services for the 2nd grade. For
25 example, the annual writing goal was expanded from three

1 sentences to five complete sentences, and new writing
2 goals were added regarding pre-writing strategies
3 information regarding recent educational assessments.
4 The DRAs and the KTEA2 were added to Owens' reading goal
5 and math goal.

6 A reading goal was added to address O.S.'s
7 comprehension. Poor short-term objectives to the math
8 goal were added, to include addition and subtraction of
9 all two-digit numbers. An organization goal was also
10 added. Short-term objectives were clarified in his
11 behavior improvement goal. Checklists were added as a
12 progress measurement tool and a number of other
13 measurement tools.

14 O.S.'s parents elected not to accept the
15 revised IEPs. And it appears -- although it's unclear,
16 but it appears he was home-schooled by his parents that
17 year rather than returned to Waynewood.

18 Now, the administrative due process hearing
19 then took place from September 17th through
20 September 19th, during which time the hearing officer
21 heard 14 witnesses. And I've now reviewed the record.
22 There was 1,189 pages of transcript.

23 During the hearing, the school presented 13
24 witnesses, many of whom were qualified as experts
25 without objection. And in contrast, the plaintiffs

1 presented one witness, O.S.'s mother. The independent
2 hearing officer also received over 200 documentary
3 exhibits submitted by both parties.

4 Then in October of 2013, the independent
5 hearing officer issued his decision concluding that the
6 school had provided a free and appropriate public
7 education to O.S. and, thus, that he was not entitled to
8 compensatory education.

9 And there were several conclusions of law.
10 I'll just summarize briefly what the hearing officer
11 said. He said that his IEPs were appropriately
12 developed. He said that O.S. made educational progress
13 in speech, language, and occupational therapy, as
14 required by the IDEA, that Fairfax County did not deny
15 O.S. a free and appropriate public education by failing
16 to provide a full-time nurse and that it didn't deny
17 O.S. that education by failing to provide a one-on-one
18 aide and that O.S. did not require extended school year
19 services.

20 And in concluding -- in reaching his
21 conclusion, the hearing officer found the testimony of
22 all of the witnesses, along with the exhibits in the
23 administrative record -- in particular, the IEPs and the
24 progress reports -- supported the conclusion that O.S.
25 had made some progress under the applicable IEPs during

1 kindergarten and 1st grade and that O.S. did not need a
2 one-on-one aide, a full-time nurse, or extended school
3 year services.

4 In particular, he referred to the testimony
5 of Betty Whiteman, O.S.'s 1st year grade teacher, who
6 had testified that IEPs were appropriate and that O.S.
7 made good progress even if that progress was not the
8 progress you would expect from an average 1st grade
9 student.

10 Ms. Colleen Wheaton, O.S.'s 1st grade
11 special ed teacher, stated O.S. did not need full-time
12 assistance because he was able to focus and stay on task
13 even without a full-time aide.

14 Fonda Green, O.S.'s speech language
15 pathologist, who provided O.S. with speech language
16 therapy, she stated that O.S. was given a sufficient
17 amount of time per week in order to make progress. And
18 she further testified that O.S.'s weaknesses in
19 articulation, sentence structure, and following
20 directions were addressed in his IEP.

21 He also -- the hearing officer also
22 referenced the testimony of Juanita Wallow, another of
23 O.S.'s special ed teachers, who testified that O.S.'s
24 kindergarten and 1st grade IEPs were appropriate and
25 further testified that it was unsurprising that a child

1 such as O.S. with disabilities would not progress at the
2 same rate as a child with no disabilities. Wallow also
3 testified that O.S. had made, in her words, tremendous
4 progress even if it was progress at a slower rate than
5 his peers and that she was very pleased with it.

6 He also referenced Amy Herins, O.S.'s
7 special ed kindergarten teacher, who testified that O.S.
8 made good progress -- her words, "good progress" --
9 toward his areas of need.

10 He also referenced Martha Petroff, O.S.'s
11 occupational therapy teacher, who testified that O.S.
12 made "very nice progress," her words, toward his goals
13 and benefited from the educational program set by the
14 IEPs.

15 He further referenced Jessica Mendez,
16 another of O.S.'s special ed teachers, who testified
17 that any regressions O.S. had were not significant
18 enough to the point where O.S. couldn't recoup the
19 losses.

20 He also referenced Jean Vogt, V-o-g-t, and
21 expert in school health nursing, who testified that a
22 full-time nurse was not necessary for O.S. to be safe
23 because healthcare emergency guidelines were put in
24 place in case a seizure occurred that was particularly
25 severe. And all school personnel, including the

1 school's health aides, knew about the healthcare
2 emergency guidelines. The hearing officer also noted
3 there was a lack of any demonstrative evidence to the
4 contrary.

5 And the hearing officer acknowledged that
6 the IDEA certainly does impose a requirement -- does not
7 impose, rather. He recognized that the IDEA doesn't
8 require the parents to hire experts and put on evidence.
9 It does mean that the parents have the burden, as I'll
10 come to come in a minute, but they don't have to present
11 any expert testimony.

12 And he did say, however, that the parents'
13 failure to offer any witnesses other than the parent
14 makes it extremely difficult, as he put it, to sustain
15 parents' position. He said especially, quote, "in light
16 of the progress reports and testimony offered as
17 evidence in support of the Fairfax school position."

18 Now, that summary of what occurred in the
19 record is sufficient for now, but the analysis should
20 begin. And to begin with, it's appropriate to set forth
21 clearly the standard of review District Courts must
22 apply in reviewing evidence and in reviewing a decision
23 of a hearing officer in an IDEA dispute.

24 In that regard, it's well-settled and
25 undisputed, really, by the parties that a District Court

1 reviewing the State administrative decision under the
2 IDEA may grant a motion for judgment on the
3 administrative record.

4 And in reviewing that decision, a District
5 Court engages in a modified de novo review making an
6 independent decision based on the preponderance of the
7 evidence while at the same time giving due weight to the
8 administrative findings provided they're regularly
9 found.

10 Because the District Court does not have the
11 same opportunity to hear and observe the witnesses as
12 they testify and thus to assess the weight and
13 credibility of the evidence presented at the hearing,
14 the hearing officer's administrative findings of fact
15 are considered prima facie correct, and the District
16 Court must explain its reasoning if it chooses not to
17 follow those findings.

18 Cases in that regard are, I think, legion.
19 And in this circuit I think probably the most oft-cited
20 case is the *Lawson* case at 354 Fed 3d. The deference,
21 however, is limited to the hearing officer's factual
22 findings, and the District Court has to make an
23 independent de novo determination of the IDEA's legal
24 requirements.

25 Finally, it's well-established that the

1 party challenging the administrative record and the
2 administrative decision bears a burden of establishing
3 that the administrative decision was erroneous.

4 The Supreme Court's decision in *Shafer* makes
5 that clear, and the Supreme Court also made clear that
6 District Courts may not substitute their own judgment
7 and their own notions of sound educational policy for
8 those of the school authorities they review.

9 Thus, a reviewing court should, to the
10 extent possible, defer to considered rulings of the
11 administrative officers who also must give appropriate
12 deference to the decisions of professional educators.
13 The *M.M.* case at 303 Fed. 3d in the Fourth Circuit makes
14 that point clear at Page 533.

15 Now, those principles provide the lens
16 through which this Court must examine the administrative
17 record. And there are some other principles that I
18 should recite. Of course, the statute makes clear that
19 all States receiving federal funds for education must
20 provide every child between three and 21 who has a
21 disability with a free and appropriate public education.

22 And the reason that Congress passed that
23 statute is to ensure that all children with disabilities
24 have available to them a free and appropriate public
25 education that emphasizes special education and related

1 services designed to meet their unique needs and prepare
2 them for employment and independent living.

3 Now, under the IDEA, a free and appropriate
4 public education must provide disabled children with
5 meaningful access to the educational process, and the
6 educational benefit required by the IDEA must provide to
7 a disabled child in the least -- you've got to do it in
8 the least restrictive and appropriate environment with a
9 child participating, to the extent possible, in the same
10 activities as non-disabled children.

11 That provision has occasioned a good deal of
12 litigation, which isn't really at issue in this case. I
13 think perhaps the most -- one of the most significant
14 provisions or legal principles at issue and applicable
15 here appears in the *Hartman* case at 118 Fed. 3d at Page
16 1,001 where the Fourth Circuit made clear that the IDEA
17 requires States to provide, quote, "specialized and
18 related services sufficient to confer some educational
19 benefit upon the handicapped child."

20 And that case makes clear that the act
21 doesn't require the furnishing of every special service
22 necessary to maximum each handicapped child's potential,
23 nor does the IDEA require a school district to provide a
24 disabled child with the best possible education. The
25 *Rowley* Supreme Court decision recognized that principle

1 at Page 192.

2 These principles all reflect the fact that
3 courts are very clear that courts, federal courts,
4 cannot run local public schools. Local educators
5 deserve some latitude in determining the individualized
6 education program most appropriate for a disabled child.

7 Now, to accomplish the goal of providing
8 specialized instructions to handicapped children, the
9 IDEA mandates that school districts receiving federal
10 funds create an appropriate individualized educational
11 program -- that's the IEP -- for each disabled child.
12 And an IEP has to contain statements concerning the
13 disabled child's level of functioning, set forth
14 measurable annual achievement goals, described the
15 services to be provided, and establish objective
16 criteria for evaluating the child's progress.

17 A number of cases and the statute itself
18 makes that clear, but a number of cases also make that
19 clear including, as I said, the *M.M.* case in the Fourth
20 Circuit.

21 Every IEP must be prepared by an IEP team,
22 which team consists of at least one representative of
23 the school district, the child's teacher, the child's
24 parents or guardian, and where appropriate the child
25 himself. Of course, for a five- or six-year-old, that

1 wouldn't be appropriate, but I've had cases where for
2 17- and 18-year-olds it is appropriate.

3 The IDEA further requires that the parents
4 or guardian of a disabled child be notified by the
5 school district of any proposed change to the IEP. It
6 also requires parents or guardians be permitted to
7 participate in discussions relating to their disabled
8 child's evaluation and education.

9 And if the parent or guardian is not
10 satisfied with the IEP, they're entitled, as occurred
11 here, to request a due process hearing. And that
12 hearing is conducted by an independent hearing officer.
13 And any party agreed by the findings may then bring suit
14 in State or Federal Court, which occurred here. And at
15 such hearing, the party requesting relief -- in this
16 case, the plaintiff -- bears the burden of persuasion,
17 as the *Shafer* case in the Supreme Court made clear.

18 Here, as I said, the plaintiffs contend that
19 the hearing officer's decision has to be reversed for
20 four reasons: First, that the hearing officer's
21 decision was not regularly made and should be reversed
22 solely because he required the parents to present
23 experts in order to prevail.

24 Second, the decision was based on anecdotal
25 testimony and is thus unsupported in the record.

1 Third, the hearing officer erred by not
2 awarding compensatory education for Fairfax County's
3 failure under the IDEA to provide extended school year
4 services, appropriate speech and language and
5 occupational services, and a one-on-one aide and a
6 school nurse.

7 And fourth, the hearing officer erred by not
8 ordering that Fairfax County develop an appropriate IEP
9 for O.S..

10 There was also a claim that he was not
11 educated in the least-restrictive environment, but that
12 claim doesn't seem to have been raised or exhausted
13 during the due process hearing and, therefore, can't be
14 reviewed here.

15 Now, the first matter the Court must
16 determine is whether or not the findings of the hearing
17 officer were regularly made and should be considered
18 prima facie correct under the law.

19 Administrative decisions are regularly made
20 so long as the process through which the decision was
21 made is within accepted norms of fact-finding process,
22 as the *J.P.* case makes clear at 516 Fed. 3d in the
23 Fourth Circuit. In *J.P.*, for example, the Court found
24 that the administrative decision was regularly made
25 because the hearing officer allowed both parties to

1 present evidence and make arguments -- that occurred
2 here -- resolve the factual questions in the normal
3 way -- that's disputed here -- without flipping a coin.
4 No one suggests that this hearing officer flipped a
5 coin, threw a dart, or otherwise abdicated his
6 responsibility, but there is a challenge that I'm going
7 to address.

8 Neither party here questioned the process by
9 which the hearing officer conducted the hearing. He
10 examined over 200 exhibits, heard three days of
11 testimony from 14 witnesses, and more than a -- 1100
12 pages of transcript.

13 And it's clear from a review of the
14 transcript that the hearing officer was not asleep at
15 the switch. He was engaged in the hearing process. He
16 interrupted when necessary to seek clarification, and he
17 regularly questioned witnesses personally.

18 His decision cites a number of times to the
19 testimony of witnesses and to exhibits in the record,
20 clearly indicating that his decision was made without
21 flipping a coin.

22 I've looked at this matter carefully. The
23 defendant -- or I beg your pardon -- the plaintiffs
24 argue that -- in fact, that's the way the argument began
25 today, is that the argument was that the hearing

1 officer's decision was remarkable for its one-sidedness,
2 use of block quotes, and objective evidence not
3 mentioned, ignored compelling evidence.

4 I don't see it that way after a careful
5 review of his decision and this record. He heard the
6 witnesses. He engaged in the hearing. He issued a
7 decision, and the decision refers to what he accepted as
8 persuasive there, the testimony of the witnesses. It's
9 one-sided in the sense that he decided for the school
10 and he wasn't persuaded by the plaintiffs' testimony.

11 Now, plaintiffs, as I said, contend that it
12 was procedurally improper because the hearing officer
13 required plaintiffs to present expert testimony to
14 prevail. I don't see that. Plaintiffs certainly are
15 correct that the IDEA doesn't require a party to present
16 expert testimony in order to prevail. It might have
17 been prudent to do so, but it doesn't require it.

18 However, plaintiffs are mistaken in assuming
19 that the hearing officer required plaintiffs to present
20 expert testimony or relied on the testimony of experts
21 no matter how conclusory merely because of their expert
22 status.

23 Ultimately, I think the plaintiffs' argument
24 on this point is baseless. They assume that the hearing
25 officer credited the Fairfax County witnesses only

1 because they were experts. Well, that's his -- that's
2 the plaintiffs' assumption. But as I see it, he
3 credited them because they were persuasive.

4 Plaintiffs also assume that the hearing
5 officer didn't find for the plaintiffs only because they
6 failed to present expert witnesses. Well, I think as a
7 tactical matter it might have been unwise not to present
8 expert testimony, but they certainly weren't required
9 to. But then, again, he had to decide the case based on
10 the evidence presented to him. And the evidence
11 presented to him persuaded him that the plaintiff was
12 not correct.

13 Plaintiffs further assume that the hearing
14 officer believed that expert witnesses can only be
15 rebutted by other expert witnesses. I don't see that in
16 there. Those assumptions are contrary to what I think
17 is the actual decision in which the hearing officer
18 explicitly stated he understood that the parents were
19 not required to present expert witnesses.

20 The hearing officer's decision relied
21 heavily on the testimony of the witnesses he heard,
22 which included experts, because, as the hearing officer
23 pointed out, and it was appropriate for him to point
24 out, plaintiff didn't present any testimony other than
25 O.S.'s mother. That doesn't mean that O.S.'s mother

1 couldn't present significant or important evidence. She
2 could. After all, it's her child. She lives with the
3 child. She knows something -- a great deal about the
4 child. But it doesn't mean that he has to accept her
5 testimony of the teachers who spend an awful lot of time
6 with the child as well and know the child quite well as
7 well.

8 So the hearing officer did not credit the
9 testimony of experts merely because they were experts.
10 He stated that he found all of the testimony of the
11 witnesses credible because they were supported by the
12 administrative record and because they were internally
13 consistent.

14 So, in the end, I don't find the argument
15 that the hearing officer improperly relied on expert
16 witnesses persuasive at all.

17 Plaintiffs also argue that the hearing
18 officer's decision was not regularly made because he
19 failed to base his decision on a preponderance of the
20 evidence insofar as he failed to acknowledge the
21 evidence presented by plaintiffs and instead relied
22 solely on unsupported anecdotal evidence -- that's
23 counsel's word -- wholly -- or "solely," unquote,
24 "unsupported anecdotal evidence presented by expert
25 witnesses.

1 Plaintiffs, as I've noted, indicated the
2 long blocks of testimony from witnesses that the hearing
3 officer relied on and testimony over plaintiffs'
4 submitted exhibits.

5 These allegations are not persuasive. It's
6 appropriate to use block quotes if you find them
7 persuasive as a hearing officer. And I do not find that
8 that contention renders the hearing officer's decision
9 unworthy of deference.

10 The Fourth Circuit has held that a hearing
11 officer is not required to explain in detail its reasons
12 for accepting the testimony of one witness over that of
13 another. That's in the *Z.P.* case at 399 Fed. 3d at 298
14 and 306.

15 In this case, the hearing officer's -- well,
16 I should also note the *J.P.* case in which the Fourth
17 Circuit more recently made clear that the IDEA does not
18 require a hearing officer to offer detailed explanations
19 of his credibility or weight assessments.

20 In this case, the hearing officer's opinion
21 and factual findings were far from deficient. He issued
22 a lengthy 25-page opinion complete with multiple
23 references to the administrative record and witnesses'
24 testimony. And he explained that he found all the
25 witnesses credible and further explained which exhibits

1 and pieces of testimony he found most important.

2 He did notice and note that the plaintiff
3 offered no witnesses besides O.S.'s mother. But
4 contrary to plaintiff's argument, the mere fact that the
5 hearing officer accepted the evidence of the school
6 board over the evidence of the mother is not a reason to
7 find the hearing officer's findings were not regularly
8 made, and they are entitled to some deference.

9 Now, we turn to the next issue. The next
10 issue is plaintiffs' argument as to O.S. having been
11 denied a free and appropriate public education because
12 he failed to make progress under the two IEPs that the
13 parents signed off on.

14 First, plaintiffs claim that O.S. was denied
15 a free and appropriate education because he failed to
16 make progress under his kindergarten and 1st grade IEPs
17 as required, she says, by the IDEA.

18 And plaintiff also claims that O.S. actually
19 regressed during those years. In other words,
20 plaintiffs argue that O.S.'s lack of progress shows the
21 IEPs were not reasonably calculated to enable the child
22 to receive educational benefits, as required under
23 *Rowley*.

24 Now, the chief evidence plaintiff relies on
25 are the two tests administered to O.S. by the Kennedy

1 Krieger Institute. One test was administered in
2 February of 2012, another administered in April of 2013.

3 According to those tests, plaintiffs contend
4 O.S. regressed in every academic area tested.

5 Plaintiffs point out that O.S. was evaluated as below
6 average in two academic areas for which he was receiving
7 specially designed education and further note that O.S.
8 was below grade level in reading, writing, and math at
9 the end of his kindergarten year.

10 And finally, they state that his lack of
11 progress is evident because he finished his kindergarten
12 year one point below the reading benchmark.

13 Now, I think what the record shows, in fact,
14 as the hearing officer concluded, is that O.S. did make
15 some progress during his kindergarten and 1st grade
16 years and was not denied a free and appropriate public
17 education. And there was plenty of evidence of this.

18 In fact, I don't have before me -- I want to
19 come back to that, but let me just summarize briefly
20 what the testimony was. His special ed teacher
21 Ms. Wallow and regular ed teacher Ms. Behrens explained
22 that O.S. had made educational progress in many areas,
23 including his ability to write sentences, write and draw
24 in his journal, sound out and so forth.

25 I can find that testimony fairly -- well,

1 let me point out that the testimony and evidence that he
2 relied on were O.S.'s general education report cards;
3 O.S.'s IEP progress reports; contemporaneous written
4 comments in O.S.'s IEPs themselves; criterion-referenced
5 tests, such as the DRA; contemporaneous notes from
6 O.S.'s private tutor confirming that O.S. was making
7 gains. This is the tutor hired by the parents, and he
8 said some fairly interested things.

9 He noted that the progress and a consistent
10 gain on his language arts progress is "quite exciting,"
11 he wrote. He didn't testify, but these matters were
12 part of the record. "Excellent progress with sounding
13 out words to spell in his book. O.S. continuous to
14 improve at a quick pace. He was able to reread a
15 passage after the words didn't make sense to him. This
16 is such a big gain for comprehension."

17 And the hearing officer also relied on
18 progress reports and notes from speech language and
19 occupational therapists and day-to-day observations by
20 his teachers.

21 Ms. Wallow testified that O.S. showed
22 progress in his attending skills and his ability to draw
23 recognizable figures and further testified that O.S.
24 was, in her words, quote, "very successful," closed
25 quotes, from kindergarten.

1 Contemporaneous progress reports created by
2 both teachers document that progress in detail. O.S.'s
3 kindergarten progress report states that O.S. made
4 outstanding progress during kindergarten. The word
5 "outstanding" is from the administrative record exhibit.

6 That report further stated that O.S. could
7 identify all of his letters and sounds, showed respect
8 to teachers and classmates, displayed and interest in
9 math concepts and activities, and was beginning to write
10 stories using creativity and estimated spelling.

11 By his fourth quarter in kindergarten, O.S.
12 was progressing toward mastery of all his kindergarten
13 objectives in the are of mathematics, and he had
14 mastered his objectives in areas of language arts,
15 science, and social studies.

16 He made progress toward every one of his IEP
17 goals during kindergarten mastering his annual goal in
18 communication and making progress towards behavior
19 improvements and fine and gross motor skills writing and
20 adapted physical ed. His own DRA score improved from 85
21 to 166 over the course of the school year. O.S. also
22 made required progress during his first year.

23 Throughout the 1st grade, O.S. made progress toward his
24 IEP goals. Maybe not as much progress as a normal 1st
25 grader might make, but he made some progress,

1 particularly in the areas of reading, math, and writing.

2 O.S.'s 1st grade teacher, Betty Whiteman,
3 testified that she saw O.S. improving in math and
4 written language throughout the entire year including,
5 as she put it, in her words, quote, "a great improvement
6 in effort and his ability to write on topic," closed
7 quotes. Ms. Whiteman based this observation on both
8 tests that she administered and projects that O.S.
9 completed in her class. O.S.'s scores on the
10 developmental reading -- the DRA improved. Ms. Whiteman
11 also testified that there were no subjects where O.S.
12 actually lost ground.

13 By the end of the first grade, O.S. had made
14 progress on all his IEP goals. Again, perhaps not quite
15 the progress one would expect of the average 1st grader,
16 but he made progress and had mastered some of them in
17 these areas -- in the areas of communication. He made
18 good progress towards his goals on self-calming
19 strategies, fine gross motor skills, and writing.

20 Now, I think it is clear, as I've said a
21 couple of times now, that O.S. did not make the progress
22 that is expected of a typical 1st grade student. But
23 even though that's true, both Ms. Wallow and
24 Ms. Whiteman testified that this was to be expected
25 since children of average intelligence, as he was, with

1 disabilities like O.S. typically progress slower than
2 children of average intelligence without disabilities.

3 Finally, Ms. Wallow testified that the fact
4 that O.S. missed the benchmark cutoff at the end of the
5 first grade by one point, stating that not all children
6 make grade level and that O.S. made the expected level
7 of progress despite being one point below the benchmark.
8 She stated that O.S. had made, in her words, quote,
9 "tremendous progress," closed quotes, during his 1st
10 grade year.

11 Now -- and it's important to point out that
12 O.S. made this progress despite the fact that he had
13 been absent for 32 days out of the year and partially
14 absent for another 19, which is essentially the
15 equivalent of missing one day every week of the 180-day
16 school year, roughly 180-day school year.

17 Now, all of this progress is documented on
18 O.S.'s first year -- or 1st grade IEP reports.
19 Throughout both O.S.'s 1st and kindergarten years, he
20 also documented progress not only in academics, but also
21 speech, language, and OT or occupational therapy.

22 Ms. Green, his speech language therapist,
23 testified that her therapy and service logs as well as
24 O.S.'s IEP progress reports showed that he was
25 progressing steadily in the area of communication. And

1 by the end of his 1st grade school year, he had mastered
2 many of his communication goals, including pronunciation
3 of the L, Z, and R sounds.

4 O.S.'s occupational therapist, Ms. Petroff,
5 likewise produced progress therapy notes showing O.S.'s
6 progress during kindergarten and 1st grade, and she
7 testified that O.S.'s progress in occupational therapy
8 included his writing getting smaller, being able to hold
9 a pencil correctly, cutting with scissors, and other
10 fine motor activities, gluing and pasting. This
11 progress was also included in O.S.'s IEP reports.

12 So it's -- the evidence is strong that he
13 made some progress and he was receiving some benefits.
14 And the evidence also doesn't show that he was
15 proceeding at the same rate as a child without his
16 disabilities, but he did show some progress.

17 Now, plaintiffs' argument to the contrary
18 are not persuasive. It's true that O.S.'s teachers
19 testified that there were areas, letter sounds and sight
20 words, for example, in which O.S. did not make the same
21 rate of progress as his non-disabled peers.

22 But, of course, this is to be expected given
23 that one of O.S.'s disabilities is processing
24 difficulties, such as his problems with auditory memory.
25 The record does reflect that O.S. made steady progress

1 toward his goal, though; albeit, as I've said several
2 times, not at the same rate as his non-disabled peers
3 and that the progress he did make was documented.

4 Plaintiffs argue that report cards and class
5 work and other sorts of things shouldn't be credited
6 because such evidence constitutes subjective rather than
7 objective evidence. That's meritless, in my view. It
8 is true that the -- and I'll come to this -- that tests
9 that the Kennedy center gave him, the -- I'll come to
10 that in a moment. It is true that that test furnishes
11 some support for the plaintiffs' position, but it
12 certainly does not contradict.

13 In fact, I think in the course of oral
14 argument, I think you quoted from that report. The
15 report itself acknowledged that he had made progress.
16 But I think it's fair to say that that report -- those
17 tests that were given at the Kennedy center, the -- I
18 keep losing my reference to that. What is it,
19 Woodcock -- here it is, Woodcock-Johnson III test at the
20 Kennedy Krieger Institute certainly provide some support
21 for the plaintiffs' contention. But it is, in effect,
22 swamped by other evidence. And it's no more objective
23 than the tests given by teachers in the classroom.

24 Now, I think it's clear that the hearing
25 officer properly concluded that O.S. was not denied a

1 free and appropriate education on the basis of the fact
2 that -- on the basis of his lack of progress. The IEPs,
3 I think, were adequate and appropriately administered
4 such that he did show some progress. He did get some
5 benefit, as the case law requires.

6 Next, whether O.S. required a one-on-one
7 aide. Plaintiffs argue that O.S. requires a one-on-one
8 aide and denial of that deprived O.S. of a free and
9 appropriate public education.

10 Plaintiffs claim that a one-on-one aide is
11 necessary for O.S. to learn because of O.S.'s attention
12 and focus problems. But the evidence contradicts that.
13 Ms. Whiteman, O.S.'s 1st grade teacher -- she's a
14 general ed teacher -- testified that O.S. did not
15 require a one-on-one aide because she and other staff
16 members in her classroom successfully used interventions
17 to help O.S. when he became distracted.

18 Ms. Mendez, a 1st grade special ed teacher
19 of O.S.'s, testified that O.S. was easily redirected
20 back on to task.

21 Ms. Wheaton, a special ed instructional
22 assistant in O.S.'s 1st grade class, testified that she
23 provided O.S. with prompts to stay focused, but that he
24 did not require those prompts full time. On
25 cross-examination, she testified that O.S. sometimes

1 lacked focus and attention, but he did not require, in
2 her words, "somebody to be standing there next to him
3 all the time telling him to return to his work," closed
4 quotes.

5 She further stated that either she as an
6 instructional assistant or his teachers were successful
7 in their ability to address O.S.'s needs regarding his
8 attention and focus problems.

9 And there was the testimony of Mr. Anderson,
10 the special ed instructional assistant in O.S.'s 1st
11 grade class. And he testified that O.S. sometimes
12 needed his assistance staying on task, but he also
13 stated that O.S. did not need a staff member assigned
14 just to him or primarily to him in order to stay on
15 task. He explained that O.S. would, "jump right back
16 into whatever he had been doing after being prompted to
17 do so." His words, "jump right back into whatever task
18 he was doing."

19 Ms. Green, O.S.'s speech language therapist,
20 testified that O.S. was easily redirected when he lost
21 focus.

22 And the principal, Meyer, testified that he
23 observed O.S. in class and noticed that when O.S. was
24 off task, his teacher would redirect him, and O.S. would
25 get back to work. He further testified that, in his

1 view, O.S. doesn't need a lot of prompting, a lot of
2 cuing.

3 In fact, several of O.S.'s teachers,
4 including Ms. Wheaton, testified that having an aide
5 constantly hovering over him like a helicopter was
6 likely to stifle O.S.'s interaction with other students
7 and make him more dependent upon the aide rather than
8 encouraging and establishing independence.

9 No one other than O.S.'s mother testified
10 during the hearing that O.S. required a full-time aide.
11 Instead, the testimony and progress reports conclusively
12 establish that O.S., although having some attention
13 problems, was sufficiently and easily redirected.

14 Now, plaintiffs argue that his attention and
15 focus problems interfered with his learning because O.S.
16 was easily distracted and needed someone to get him
17 started and clarify directions for him.

18 In this respect, plaintiffs point to
19 Ms. Whiteman's testimony that O.S.'s attention, his
20 easily distracted problem, impacted his ability to stay
21 on task and make progress. Well, it's undisputed,
22 clearly, that O.S. had some attention problems. No
23 doubt about that. However, plaintiffs fail to address
24 the fact that the record evidence supports the hearing
25 officer's conclusion that these attention problems were

1 adequately met by the teachers and instructional
2 assistants at the school. Simply because a student has
3 attention problems does not automatically warrant a
4 one-on-one aide. And I think the hearing officer's
5 decision in this regard is firmly supported by more than
6 a preponderance of the evidence. A one-on-one aide was
7 not required.

8 Next, the plaintiffs further claim that O.S.
9 was denied a free and appropriate public education
10 because he should have received extended school year
11 services.

12 The Fourth Circuit has made clear that
13 extended school year services are only necessary to a
14 free and appropriate public education when the benefits
15 of disabled child gains during a regular school year
16 will be significantly jeopardized if he's not provided
17 with an educational program during the summer months.
18 But -- that's the *J.D.* case at 326 Fed. 3d at 567.

19 But extended school year services are not
20 necessarily required when a student has shown regression
21 during breaks and services because all students,
22 disabled or not, may regress to some extent during
23 lengthy breaks from school. The *Deburo* (phonetics) case
24 at 309 Fed. 3d contains that information.

25 But, of course, that's a well-known fact to

1 all of us. I attended so many schools in so many
2 countries and places that I don't remember it clearly.
3 But I don't have any doubt that I used every moment I
4 could to regress. It was my goal to regress.

5 In any event, that's irrelevant. What's
6 relevant here is whether the evidence is that -- or
7 supports the hearing officer's conclusion that he did
8 not require extended school year services.

9 The record reveals that O.S. never
10 demonstrated the type of regression that would require
11 extended school year services. Ms. Wallow testified
12 that O.S. ended kindergarten at one point below the
13 reading benchmark for the end-of-the-year kindergarten.
14 And Ms. Whiteman testifies that O.S. started his 1st
15 grade year on grade level for reading, demonstrating
16 little, if any, reading regression during the summer
17 between kindergarten and first grade.

18 Ms. Mendez, O.S.'s special ed teacher,
19 testified that O.S. had demonstrated no regression that
20 he could not promptly recoup. She also testified that
21 she didn't observe any regression significant enough to
22 warrant extended school year services during the winter
23 and spring breaks.

24 This testimony was further corroborated by
25 the testimony of Ms. Behrens and Dr. Powell, who stated

1 that O.S. objectively did not demonstrate regression.

2 So based on this testimony and on the record
3 establishing that O.S. did not significantly regress
4 between his school years, defendant's denial of ESY or
5 extended school year services did not deprive O.S. of a
6 fair and appropriate public education. The hearing
7 officer's decision in this regard is fully supported by
8 a robust record.

9 Finally is the question whether O.S.
10 required a full-time nurse. Under the IDEA, school
11 districts are required to provide where necessary school
12 health services and school nurse services as a related
13 service. The regulations make that clear.
14 34CFR300.34(a).

15 School health services mean health services
16 that are designed to enable a child with a disability to
17 receive a free and appropriate public education as
18 described in the IEP. School health services may be
19 provided by a qualified school nurse or other qualified
20 person, as the regulation recognizes.

21 Plaintiffs argue that O.S.'s seizure
22 disorder, which is reflected in his IEP, warrants a
23 full-time nurse. That argument is not persuasive at
24 all.

25 To begin with, O.S.'s doctors opine that

1 O.S. was no longer having seizures as of January 2012.
2 In fact, the record doesn't show that he had any
3 seizures during his school year. And plaintiffs admit
4 that O.S. had not had visible seizures for some time.

5 I will say, though, that it's important for
6 people to be trained about seizures. A child having a
7 seizure can be a frightening event for the child, very
8 frightening for the child, and frightening for the
9 school people.

10 But, in any event, fortunately none of that
11 occurred here. It may be -- I don't know that there was
12 that much evidence in this regard, but this is -- the
13 Doose affliction that he had is something some children
14 outgrow.

15 In any event, Ms. Vogt, an expert in school
16 health nursing, testified that O.S. did not require a
17 full-time school nurse in order to be safe. She stated
18 a school nurse rather than a healthcare aide is
19 necessary and appropriate only in situations where
20 medical and clinical judgment is necessary.

21 For example, when a student requires
22 reinsertion of a tracheotomy or tracheostomy or when a
23 student is on oxygen. In contrast, O.S.'s situation,
24 she testified, doesn't require medical clinical judgment
25 because basic first aid could meet his needs in the

1 event of a seizure and clinical judgment doesn't come in
2 to play.

3 And she testified that the healthcare plan
4 in place for O.S., which was a standard Fairfax County
5 plan relating to seizures, was adequate and appropriate
6 and no specialized seizure plan was necessary in order
7 for O.S. to be safe.

8 So the lack of a full-time nurse at
9 Waynewood did not deprive O.S. of a free and appropriate
10 public education, and the record firmly supported the
11 hearing officer's conclusions in that regard.

12 So, in conclusion and in summary, O.S.'s
13 kindergarten and 1st year IEPs did provide O.S. with a
14 free and appropriate public education under the IDEA,
15 and the documentary evidence and testimony provide
16 persuasive, indeed overwhelming, testimony in support of
17 the conclusion reached by the hearing officer that he
18 made some progress during those years and that he was
19 safe and that he did not need a full-time aide and he
20 did not regress to the point that he needed the ESY.

21 In essence, the plaintiffs didn't not carry
22 their burden of proof in establishing that O.S. was
23 denied a free and appropriate public education in those
24 respects.

25 Accordingly, the hearing officer's decision

1 denying plaintiffs' claim for compensatory education
2 must be affirmed and judgment on the administrative
3 record must be granted in favor of the defendant and
4 against the plaintiff.

5 I thank counsel for your cooperation and
6 your helpful arguments. I'll enter an order
7 accordingly. Court stands in recess.

8 (Court adjourned at 2:20 p.m.)

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CERTIFICATE

I, MICHAEL A. RODRIQUEZ, an Official Court Reporter for the United States District Court, in the Eastern District of Virginia, Alexandria Division, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had upon the motions hearing in the case of O.S. S. V. FAIRFAX COUNTY SCHOOL BOARD.

I further certify that I was authorized and did report by stenotype the proceedings in said motions hearing, and that the foregoing pages, numbered 1 to 69, inclusive, constitute the official transcript of said proceedings as taken from my machine shorthand notes.

IN WITNESS WHEREOF, I have hereto subscribed my name this 15th day of October, 2014.

/s/

Michael A. Rodriguez, RPR/CM/RMR
Official Court Reporter

MICHAEL A. RODRIQUEZ, RPR/CM/RMR